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No. 97-315

In the Supreme Court of the United States

OCTOBER TERM, 1997

CLINTON MANGES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, when the jury has returned a general verdict of guilty on a count charging a multiple-object conspiracy, the district court may determine which offense was the object of the conspiracy for purposes of imposing sentence under the Sentencing Guidelines.

2. Whether the district court made adequate findings of fact at sentencing.

3. Whether petitioner Manges was entitled to pretrial dismissal of the indictment because of preindictment delay.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 110 F.3d 1162.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1997. A petition for rehearing was denied on May 21, 1997. Pet. App. B1-B2.[1] The petition for a writ of certiorari was filed on August 19, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Petitioners filed only a suggestion for rehearing en banc, but the court of appeals treated it as including a petition for rehearing.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioners Clinton Manges, David Myers, and Carl Shanklin were convicted of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371. In addition, Myers and Shanklin each were convicted of committing a substantive mail fraud offense, in violation of 18 U.S.C. 1341 and 1346. Manges was sentenced to 27 months' imprisonment and a $50,000 fine; Myers was sentenced to concurrent terms of 30 months' imprisonment and a $50,000 fine; and Shanklin was sentenced to concurrent terms of eight months' imprisonment. The court of appeals reversed Shanklin's conspiracy conviction, and affirmed in all other respects. Pet. App. A1-A36; Gov't C.A. Br. 3.

1. The evidence at trial established that petitioners participated in a scheme unlawfully to retain the oil and gas mineral rights to a parcel of submerged property in Corpus Christi, Texas, known as tract 350. Petitioners prevented the leased mineral rights to tract 350 from reverting to the State by submitting false documents to state regulatory agencies and by making corrupt payments to a state official. Pet. App. A1.

The mineral rights to tract 350 were controlled by the Texas General Land Office (GLO). The GLO employs a competitive bid process to assign subsurface oil and gas rights throughout Texas. Successful bidders are required to pay to the State yearly rental fees, plus royalties representing a portion of their revenues. Under applicable state regulations, the holder of an oil and gas lease must act affirmatively to maintain the rights granted by the State. The holder

of the lease must (1) continuously produce oil and gas; (2) make timely and diligent "workover" efforts to restore or increase productive capacity; or (3) make payments known as "shut-in royalties" if a tract is capable of producing oil and gas but does not produce. If none of the foregoing requirements is met, the lease reverts back to the State. The GLO may then re-lease the tract to the highest bidder. Pet. App. A3.

Petitioner Myers was an oil industry entrepreneur based in San Antonio, Texas. Through companies that he owned, Myers subleased the oil and gas rights to tract 350 and three adjacent tracts. Between April 1988 and September 1989, tract 350 should have reverted to the State for lack of production. Myers sought to prevent the tract's reversion. Instead of meeting the requirements imposed by state law, however, Myers submitted false production figures and affidavits to the GLO to indicate that the lease had been maintained. In addition, Myers tried to buy the favor of the GLO's chief clerk, Jack Giberson. Pet. App. A2-A3; Indictment at 6.

One of the affidavits submitted by Myers to the GLO falsely stated that tract 350 had been worked over in compliance with state regulations. The affidavit was supported by false time records and field reports that were prepared and signed by Shanklin, who was an independent contractor specializing in workover operations. Pet. App. A2, A4.

The payments to Giberson were made through Manges, "an oilman and rancher, wheeler-dealer and political king-maker" in South Texas. Pet. App. A2. Manges tried to convince his contacts at the GLO that the lease to tract 350 had been maintained in accordance with regulations. Manges attended a meet-

ing with Giberson to discuss tract 350, and made five payments to Giberson totalling $30,100. *Id.* at A5.

Myers' efforts to retain the mineral rights to tract 350 were successful. On September 19, 1989, a GLO staff geologist mailed a letter to the tract's operator of record stating that the lease had been maintained. Pet. App. A5. Accordingly, the GLO did not seek to cancel and forfeit Myers' lease.

2. Based on those events, petitioners were charged with conspiracy to commit mail fraud, in violation of 18 U.S.C. 371. The indictment charged that there were two unlawful objects of the mail fraud conspiracy: (1) to obtain money and property by means of false pretenses, in violation of 18 U.S.C. 1341; and (2) to deprive the residents of the State of Texas of their right to the honest services of their state agencies, in violation of 18 U.S.C. 1341 and 1346. Pet. App. A6; Indictment at 6. Myers and Shanklin also were charged with a substantive mail fraud violation, under 18 U.S.C. 1341 and 1346.[2]

Before trial, all three petitioners filed motions to dismiss the indictment, alleging prejudicial preindictment delay. None of the motions to dismiss asserted or showed that the government had intentionally delayed bringing charges to gain a tactical advantage. The district court denied the motions to dismiss without a hearing and without making any findings as to

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[2] In addition, the indictment charged Manges with bribery, in violation of 18 U.S.C. 666. At the close of evidence, the district court entered a judgment of acquittal for Manges on the bribery count because the government's proof was insufficient to establish that the GLO received more than $10,000 annually in federal aid, as required to support a federal bribery prosecution under 18 U.S.C. 666(b). Pet. App. A7.

whether petitioners were actually prejudiced by the delay. Gov't C.A. Br. 34.

After a joint jury trial, all three petitioners were convicted of conspiracy to commit mail fraud. Shanklin and Myers also were convicted of substantive mail fraud violations. The verdict form did not specify whether the convictions rested on the theory that petitioners had obtained money or property by means of false pretenses, or on the theory that they had deprived residents of the State of Texas of the right to honest services from their state agencies. Pet. App. A7, A34.

At sentencing, the district court assigned each petitioner a base offense level of ten, pursuant to United States Sentencing Guidelines (U.S.S.G.) § 2C1.7, which governs frauds that deprive the public of its intangible right to the honest services of government officials. The district court then increased each petitioner's offense level by eight, reflecting the court's finding that the fraud "involved giving a thing of value to a high level employee of the General Land Office." Sentencing Tr. 38; U.S.S.G. § 2C1.7(b)(1)(B). Based on petitioners' total offense level of 18 and their criminal histories, they were subject to a sentencing range of 27 to 33 months' imprisonment. Pet. App. A32.[3] Although Manges and Myers were sentenced within the applicable Guidelines range, the district

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[3] The same calculation applies with respect to both the conspiracy convictions and the substantive mail fraud convictions. The Sentencing Guidelines provide that the base offense level for conspiracy under 18 U.S.C. 371 is the same as the base offense level for the substantive offense that was the conspiracy's object. U.S.S.G. § 2X1.1(a); Pet. App. A31. Shanklin and Myers received concurrent sentences for their conspiracy and mail fraud convictions. *Id.* at A32-A33.

court held that Shanklin's minor role in the offense justified a downward departure, and sentenced him to eight months' imprisonment. *Id.* at A33.

Petitioners argued that their base offense level should have been 6, pursuant to the Guideline for defrauding another of money or property, U.S.S.G. § 2F1.1(a). Pet. App. A33. It is unclear, however, what petitioners' Guidelines range would have been had they been sentenced under Section 2F1.1 because the district court made no findings with respect to specific offense characteristics under that Section.[4]

3. The court of appeals reversed Shanklin's conspiracy conviction, but affirmed in all other respects. With respect to the conspiracy count, the court noted that the government bore the burden of showing that at least one overt act in furtherance of the conspiracy

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[4] Section 2F1.1 provides for an increase in the offense level corresponding to the amount of loss caused by the offense. Although petitioners argued that there should be no increase based on loss amount (Sentencing Tr. 9), and the district court assessed no restitution (*id.* at 38), petitioners' presentence reports indicate that the GLO estimated its loss from the false production reports to be $67,643.62. Myers PSR 8-9; Manges PSR 8-9; Shanklin PSR 8-9. That sum would require a five-level increase above the base offense level of six. U.S.S.G. § 2F1.1(b)(1)(F). The PSRs also indicate that, although the true loss to the State of Texas could not be readily determined, the value of the lease to tract 350 was in the millions of dollars, as Myers sold just 6% of the working interest in his four tracts for $400,000 in July 1988. Myers PSR 9; Manges PSR 9; Shanklin PSR 9. Any loss amount in the millions would result in an offense level at least as high as the total offense level for the public corruption offense. In addition, petitioners may have been eligible for an additional two-level increase for more than minimal planning. See U.S.S.G. § 2F1.1(b)(2). Thus, it is unclear that petitioners would have benefited had they been sentenced under Section 2F1.1 as they requested.

occurred within a span of five years before Shanklin's indictment on September 14, 1994. The government asserted that it had met the time requirement based on the letter that was mailed by the GLO on September 19, 1989, which stated that the lease to tract 350 had been maintained. The court reasoned, however, that the mailing of the September 19 letter could not qualify as an overt act in furtherance of the conspiracy because the GLO was not a conspirator. Accordingly, the court reversed Shanklin's conspiracy conviction. Pet. App. A8, A10-A11.

The court of appeals rejected petitioners' claim that the district court erred in sentencing them under the guideline governing public corruption offenses, rather than under the general guideline for fraud offenses. Addressing only petitioners' sentences for the conspiracy convictions, the court relied on Section 1B1.2(d) to hold that the Guidelines empowered the district court to sentence petitioners for the more serious of the two charged conspiracy objects, provided that the district court itself would have convicted them on that basis. Pet. App. A33-A34.

Section 1B1.2(d) provides that a defendant found guilty of a multiple-object conspiracy count should be sentenced "as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." The court explained that the hypothetical conspiracy convictions should then be grouped under Chapter 3, Part D of the Guidelines, which governs multiple counts of conviction. Pet. App. A34 (citing U.S.S.G. 1B1.2, comment. note 4; *United States* v. *Fisher*, 22 F.3d 574, 576 (5th Cir.), cert. denied, 513 U.S. 1008 (1994)). "When multiple counts result from a common scheme, they are deemed a single group and are assigned the offense

level for the most serious offense in the group." *Ibid.* (citing *Fisher*, 22 F.3d at 576).

The court of appeals noted (Pet. App. A34), however, that the operation of Section 1B1.2(d) is restricted by its commentary, which states:

> Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense.

U.S.S.G. § 1B1.2(d), comment., n.5.

The Guidelines provide that the district court's determination of the conspiracy's object offense "should be governed by a reasonable doubt standard." U.S.S.G. App. C., amend. 75 (Nov. 1, 1989). Although the district court did not state whether it had found beyond a reasonable doubt that petitioners had conspired to commit mail fraud based on the honest services theory, the court of appeals held that such a finding was implicit in the district court record. Pet. App. A34. Citing the district court's finding that the offense "involved[] giving a thing of value to a high level employee of the General Land Office," the court of appeals reasoned that such a finding presupposes that the conspiracy at issue involved a deprivation of the public's right to the honest services of a government official. *Id.* at A35.

The court of appeals summarily rejected Manges' claim that his conviction should be reversed because of prejudicial preindictment delay. The court based

its holding on Manges' failure to contend that the government had delayed in bad faith or to secure a tactical advantage. Pet. App. A11 n.3 (citing *United States* v. *Crouch*, 84 F.3d 1497, 1500 (5th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 736 (1997)). The court also noted that Manges had executed a written waiver of his statute of limitations defense. Pet. App. A11 n.3.

ARGUMENT

1. Petitioners contend (Pet. 11-18) that the object of a conspiracy is an element of the offense that should be determined by the jury, and that the district court's determination of that issue violated the Due Process Clause of the Fifth Amendment and the Sixth Amendment jury trial right. Accordingly, petitioners argue that the district court exceeded its constitutional power when it sentenced them for conspiring to commit a fraud involving public corruption, rather than for conspiring to defraud another of money or property. In petitioners' view, when faced with a general verdict of guilty on a multiple-object conspiracy case, the sentencing court is required to impose a sentence based on the least serious object. Petitioners further contend that the opinion of the court of appeals conflicts with decisions in several other circuits. Those contentions are without merit.

a. In *Griffin* v. *United States*, 502 U.S. 46, 49 (1991), this Court reaffirmed the long-established rule that a general verdict of guilty on a multiple-object conspiracy count may stand as long as there was sufficient evidence on one of the submitted objects, even though such a verdict gives no assurance that the jury actually relied on that object. It is also well-established that a sentencing court may base the

sentence on a factor that is not stated as an element of the offense. See, *e.g.*, *McMillan* v. *Pennsylvania*, 477 U.S. 79, 93 (1986). A sentencing court has discretion to take into account even evidence introduced at trial for different offenses on which the defendant was ultimately acquitted. *United States* v. *Watts*, 117 S. Ct. 633, 635-636 (1997) (per curiam). From these decisions, it follows that the sentencing court may determine which object of a multi-object conspiracy shall be considered in establishing the sentence, even though the jury did not make a finding on that point in returning a general verdict of guilty.

In determining at sentencing that petitioners conspired to commit a fraud involving public corruption, the district court did not decide an element of the offense that was required to be found by the jury. The general conspiracy statute pursuant to which petitioners were convicted, 18 U.S.C. 371, makes it a crime to conspire to commit any offense against the United States and to perform an overt act to effectuate the object of the conspiracy. Accordingly, it is an element of a multiple-object conspiracy that the defendant conspired to commit one or more of the charged objects. The jury in this case could not have found petitioners guilty on the conspiracy count had it not found beyond a reasonable doubt all of the elements of the conspiracy specified in Section 371. That is all the Sixth Amendment requires.[5] The

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[5] Petitioners' reliance (Pet. 16-17) on *United States* v. *Gaudin*, 515 U.S. 506 (1995), is misplaced. In *Gaudin*, this Court held that, in a prosecution under 18 U.S.C. 1001, the materiality of a false statement is an element of the offense that must be determined by the jury, and not by the district court. The Court noted that criminal convictions must "rest upon a jury determination that the defendant is guilty of every ele-

district court's finding that petitioners conspired to commit the public corruption object simply represented the determination of a sentencing factor. That is so even though the sentencing factor mirrors a determination also made by the jury at the guilt stage. In a multiple-object conspiracy case, once the jury finds the defendant guilty of conspiring to commit any charged object, it is the court's role to determine which charged objects were sufficiently proved to serve as a basis for the sentence. See *McMillan* v. *Pennsylvania*, 477 U.S. at 93 ("[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.").

b. Petitioners cite (Pet. 11-12) several cases holding that the punishment imposed after a general verdict of guilty in a multiple-object conspiracy case, where the penalty authorized by the conspiracy statute depends on the penalty authorized for the object offenses, may not exceed the maximum penalty authorized by statute for the less serious object offense. See *United States* v. *Garcia*, 37 F.3d 1359, 1369-1370 (9th Cir. 1994), cert. denied, 514 U.S. 1067 (1995); *Newman* v. *United States*, 817 F.2d 635, 637 (10th Cir. 1987); *United States* v. *Orozco-Prada*, 732 F.2d 1076, 1083-1084 (2d Cir.), cert. denied, 469 U.S. 845 (1984); *United States* v. *Quicksey*, 525 F.2d 337, 340-341 (4th Cir. 1975), cert. denied, 423 U.S. 1087

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ment of the crime with which he is charged, beyond a reasonable doubt." *Id.* at 510. In *Gaudin*, however, it was uncontested that materiality was an element of the offense of making false statements. *Id.* at 511. Petitioners' application of *Gaudin* to the instant context is erroneous because the precise object of a conspiracy charged under 18 U.S.C. 371 is not an element of the offense.

(1976); *Brown* v. *United States*, 299 F.2d 438, 440 (D.C. Cir.), cert. denied, 370 U.S. 946 (1962). The underlying concern in those cases, which were decided before the advent of the Sentencing Guidelines, arises when a court attempts to impose a sentence above the statutory maximum applicable to the crime for which the defendant was convicted. That concern is not raised here. The maximum statutory sentence to which petitioners are exposed for the conspiracy count does not depend on the sentencing ranges authorized under the Sentencing Guidelines for the object offenses; rather, the maximum sentence under Section 371 is five years' imprisonment—regardless of the object on which the jury relied to find the defendants guilty under Section 371. The district court sentenced all three petitioners below the statutory maximum for conspiracy, and even departed below the applicable Guidelines range with respect to Shanklin.

Petitioners also cite two other cases as conflicting with the decision below and as support for their position. In both *United States* v. *Pace*, 981 F.2d 1123 (10th Cir. 1992), cert. denied, 507 U.S. 966 (1993), and *United States* v. *Owens*, 904 F.2d 411 (8th Cir. 1990), the defendants were charged with conspiring to traffic in "methamphetamine/amphetamine" under 21 U.S.C. 846, the conspiracy offense applicable to drug offenses. Each jury returned a general verdict that did not specify which drug was the object of the conspiracy. The district courts in those cases found that the drug involved was methamphetamine, and consequently sentenced the defendants under the Sentencing Guidelines to longer jail terms than would have been prescribed if the drug had been found to be amphetamine. The courts of appeals vacated the sentences, concluding that the defendants should have

been sentenced under the guideline yielding the less severe penalty. *Pace*, 981 F.2d at 1130; *Owens*, 904 F.2d at 415. Both courts of appeals rested their holdings on the fact that it was not clear from the jury's verdict on which drug—methamphetamine or amphetamine—the convictions rested.

The Seventh Circuit has recently concluded that *Pace* and *Owens* were wrongly decided and that a district court does not err in sentencing the defendants under the guideline yielding the more severe penalty when the jury returns a general verdict of guilty on a charge of conspiracy to distribute powder cocaine and cocaine base. See *United States* v. *Edwards*, 105 F.3d 1179, 1180 (1997). The issue is currently before this Court in *Edwards* v. *United States*, petition for cert. granted ~~pending~~ (No. 96-8732). The government has filed a brief acquiescing in the Court's review of *Edwards*.[6]

The instant petition should not be held pending this Court's disposition of *Edwards* because the *Edwards* line of cases is inapposite here.[7] First, the conspiracy provisions in 21 U.S.C. 846 and 18 U.S.C. 371 differ insofar as Section 846 directs the sentencer to impose

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[6] We have provided petitioners here with a copy of our brief in *Edwards*.

[7] Petitioner also cites (Pet. 12) as conflicting *United States* v. *Bush*, 70 F.3d 557 (10th Cir. 1995), cert. denied, 116 S. Ct. 795 (1996). That case is distinguishable because it involved the adequacy of a guilty plea, and the issue was whether the defendant had intentionally pleaded guilty to the charge under 21 U.S.C. 846 involving a particular drug. Although the court of appeals relied on its analysis in *Pace*, see 70 F.3d at 561-562, the issue of a defendant's intent in pleading guilty to a Section 846 conspiracy has no bearing on what facts the jury is required to find beyond a reasonable doubt in a prosecution brought under 18 U.S.C. 371.

the penalty to the underlying substantive offense, whereas Section 371 provides generally that persons convicted under that provision shall receive a maximum penalty of five years' imprisonment irrespective of the penalty prescribed for the underlying offense that was the object of the conspiracy. That distinction is important, because Section 846 points to the penalty imposed by the underlying object offense, whereas Section 371 does not.

Pace, *Owens* and *Edwards* are also distinguishable in that those cases do not apply U.S.S.G. § 1B1.2(d). Drug conspiracies prosecuted under 21 U.S.C. 846 are governed by different sentencing provisions. The offense level for a drug conspiracy generally corresponds to the total quantity of the controlled substance involved. See U.S.S.G. §§ 3D1.2(d), 3D1.3(b). Thus, the procedure prescribed by Section 1B1.2(d), which ultimately requires the adoption of the offense level for the most serious of the object offenses (see U.S.S.G. § 3D1.3(a)), is inapplicable. Commentary accompanying Section 1B1.2(d) notes that if the object offenses specified in the conspiracy count would be grouped together under Section 3D1.2(d), *i.e.*, according to the quantity involved, the analysis under Section 1B1.2(d) is unnecessary. See U.S.S.G. 1B1.2(d), comment., n.5. Because *Pace*, *Owens*, and *Edwards* arose under 21 U.S.C. 846, they do not present a direct conflict with petitioner's case, which arises under 18 U.S.C. 371 and applies Section 1B1.2(d).

The opinion of the court below is consistent with the only other court of appeals decision that addresses the constitutionality of Section 1B1.2(d) in the context of a conspiracy sentence under 18 U.S.C. 371. In *United States* v. *Conley*, 92 F.3d 157 (3d Cir. 1996), cert. denied, 117 S. Ct. 1244 (1997), the Third

Circuit upheld the sentence of a defendant who had been convicted of conspiring to conduct an illegal gambling business and to launder the gambling proceeds, in violation of Section 371. Applying Section 1B1.2(d), the district court found that the defendant had conspired to bring about both illegal objectives, and sentenced him under the Guidelines provisions relating to the more serious offense, money laundering. The court of appeals held that the defendant's sentence under Section 1B1.2(d) did not violate the Due Process Clause of the Fifth Amendment or the defendant's Sixth Amendment right to a jury trial. See also *United States* v. *Malpeso*, 115 F.3d 155, 167-168 (2d Cir. 1997) (upholding Section 1B1.2(d) on similar reasoning, as applied to conspiracy sentencing under 18 U.S.C. 1959(a)(5)). Thus, on the narrow issue actually presented by the petition—whether the sentences in this case under 18 U.S.C. 371 were constitutionally imposed—petitioners can present no conflict among the courts of appeals or other reason warranting this Court's review.[8]

2. Petitioners contend (Pet. 18-22) that the court of appeals erred in holding that their sentences were adequately supported by factual findings that were implicit in the district court record. That contention is without merit.

A court may rely on implied findings of fact in upholding a defendant's sentence under Section

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[8] Myers and Shanklin argue that the analysis with respect to the validity of the conspiracy sentences "appl[ies] equally" to their sentences for the substantive mail fraud convictions. Pet. 11 n.3. That argument was neither properly raised below nor addressed by the court of appeals, and therefore does not warrant this Court's consideration. See *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 644-645 (1992).

§ 1B1.2(d). See *United States* v. *Fisher*, 22 F.3d 574, 577 (5th Cir.) ("[Section 1B1.2(d)] findings must be either explicit or implicit in [the] record."), cert. denied, 513 U.S. 1008 (1994); *United States* v. *Reese*, 2 F.3d 870, 893-894 (9th Cir. 1993) (implied findings are adequate to support sentence under Section 1B1.2(d)), cert. denied, 510 U.S. 1094 (1994); cf. *United States* v. *McKinley*, 995 F.2d 1020, 1026 (11th Cir. 1993), cert. denied, 511 U.S. 1021 (1994); see also *United States* v. *Grant*, 114 F.3d 323, 327 (1st Cir. 1997) ("a court may make implicit findings with regard to sentencing matters"). Here, the court of appeals correctly based its determination on the district court's finding that the offense "involved[] giving a thing of value to a high level employee of the General Land Office." Pet. App. A35. That finding constituted "clear evidence" that, in the district court's view, the conspiracy at issue involved a deprivation of the public's right to honest services of a government official. *Ibid.*

Petitioners erroneously assert (Pet. 18-22) that the court of appeals' reliance on implicit findings was inconsistent with *United States* v. *Gaudin*, *supra*, and Federal Rules of Criminal Procedure 32(c).[9] As discussed at page 10 note 5, *supra*, *Gaudin* is inapposite here because the precise object of a conspiracy under 18 U.S.C. 371 is not an element of the offense that must be determined by the jury. Nor does the decision of the court of appeals run afoul of Rule 32(c). That rule requires, in pertinent part: "For each

[9] Petitioners also claim (Pet. 20-22) that the opinion of the court of appeals violates "U.S.S.G. § 2B1.2(d)." The reference to Section 2B1.2 appears to be a typographical error, as that section has been deleted from the Federal Sentencing Guidelines Manual. We read that reference as a citation to Section 1B1.2, discussed *supra*.

matter controverted [at sentencing], the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing." Fed. R. Crim P. 32(c). In no way does the rule preclude the making of implicit, as opposed to express, findings of fact.

Finally, to the extent that petitioners assert that the record does not provide a basis for the implicit findings at issue (Pet. 20), that claim is factbound and does not warrant this Court's review.

3. Manges contends (Pet. 23-29) that he was entitled to pre-trial dismissal of the indictment because of prejudicial preindictment delay. There is a conflict in the circuits on the standard for determining claims of preindictment delay, but that conflict is not properly presented on the record of this case. Accordingly, further review is unwarranted.

The principal protection against preindictment delay is afforded by the applicable statute of limitations. Nevertheless, the Due Process Clause "has a limited role to play in protecting against oppressive delay" in the filing of an indictment. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 789 (1977). That limited protection, the Court ruled in *Lovasco* (*id.* at 789-790), is available only when the defendant has sustained actual prejudice from the delay, and the government's reasons for the delay are not adequate to justify going forward with a trial, in light of "fundamental conceptions of justice." *Id.* at 790-791 (citations and internal quotation marks omitted). The Court held that, while delay would not be justified where the government sought "to gain tactical advantage over the accused," *id.* at 795 (quoting *United States* v. *Marion*, 404 U.S. 307, 324 (1971)), investiga-

tive delay does not deprive a defendant of due process, *ibid.* Investigative delay remains justifiable even when sufficient evidence exists to seek an indictment and even when the continued investigation focuses not on the defendant himself but on other participants in related criminal activity. See *Lovasco*, 431 U.S. at 791-796.

The lower courts have adopted different approaches in applying the *Lovasco* standard. As did the court below (Pet. App. A11 n.3), most courts of appeals have correctly ruled that relief is available only if the defendant is actually prejudiced and the government intended to delay the indictment in order to obtain a tactical advantage over the defendant or for some other bad faith purpose. See, *e.g.*, *United States* v. *Crouch*, 84 F.3d 1497, 1500 (5th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 736 (1997); *United States* v. *Hayes*, 40 F.3d 362, 365 (11th Cir. 1994), cert. denied, 116 S. Ct. 62 (1995); *United States* v. *Stierwalt*, 16 F.3d 282, 285 (8th Cir. 1994); *United States* v. *Engstrom*, 965 F.2d 836, 839 (10th Cir. 1992); *United States* v. *Brown*, 959 F.2d 63, 66 (6th Cir. 1992); *United States* v. *Ismaili*, 828 F.2d 153, 167 (3d Cir. 1987), cert. denied, 485 U.S. 935 (1988); *United States* v. *Hoo*, 825 F.2d 667, 671 (2d Cir. 1987), cert. denied, 484 U.S. 1035 (1988); *United States* v. *Crooks*, 766 F.2d 7, 11 (1st Cir.) (Breyer, J.), cert. denied, 474 U.S. 996 (1985). That reading of *Lovasco* is consistent with this Court's description of the due process violation in cases of preindictment delay as resting on actual prejudice and deliberate delay for the purpose of obtaining a tactical advantage. See *Arizona* v. *Youngblood*, 488 U.S. 51, 57 (1988); *United States* v. *Gouveia*, 467 U.S. 180, 192 (1984); *Marion*, 404 U.S. at 324.

Three circuits apply a "balancing" test in assessing a due process challenge for preindictment delay. The Ninth Circuit has held that if the defendant shows prejudice, the court must then balance the length of the delay against the government's reasons for the delay. See *e.g.*, *United States* v. *Bracy*, 67 F.3d 1421, 1427 (1995); *United States* v. *Valentine*, 783 F.2d 1413, 1416 (1986). The Seventh Circuit has held that once the defendant shows prejudice, the burden shifts to the government to explain the reasons for the delay and the court then balances the prejudice against those reasons. See, *e.g.*, *United States* v. *Canoy*, 38 F.3d 893, 902 (1994); *United States* v. *Sowa*, 34 F.3d 447, 451 (1994), cert. denied, 513 U.S. 1117 (1995). The Fourth Circuit has held that if the defendant shows actual prejudice from the delay, the court must balance the defendant's prejudice against the government's justification for the delay to determine whether the delay violated fundamental conceptions of justice or the community's sense of fair play and decency. *Howell* v. *Barker*, 904 F.2d 889, 895, cert. denied, 498 U.S. 1016 (1990).

The conflict in the circuits on this issue is not properly presented on the record of this case. The circuits that apply a balancing test require the defendant to make a showing of actual prejudice before the reasons for the delay are examined. See, *e.g.*, *Bracy*, 67 F.3d at 1427 & n.3; *Canoy*, 38 F.3d at 902; *Sowa*, 34 F.3d at 451; *Howell*, 904 F.2d at 895. As those courts have uniformly held, the defendant must establish actual prejudice in the first instance before the court will weigh the length of the delay against the government's reasons for the delay. Because the district court made no finding with respect to whether Manges was actually prejudiced by the delay in his

case, the record does not establish whether or not the precedents of the Fourth, Seventh, and Ninth Circuits would have required a balancing analysis in this instance. It is thus unclear whether Manges would have derived any benefit from any other court of appeals' approach. Accordingly, the case does not present an appropriate vehicle for resolving the conflict among the circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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